
IN THE MISSOURI SUPREME COURT

SC83805

**BEVERLY SUE RYAN, P.A.
CONSERVATOR FOR THE ESTATE OF RUTH SPIEGELHALTER**

Respondent

vs.

WILLIAM SPIEGELHALTER, ET AL.,

Respondents

and

GARY AND TERESA GABEL

Appellants

**APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
PROBATE DIVISION
HON. LARRY D. HARMAN, JUDGE**

RESPONDENT BEVERLY SUE RYAN, P.A.'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

While Appellants have accurately recited certain factual information concerning the underlying action, certain information has been omitted.

Appellants included in the Legal File the Case History Sheet for the conservatorship proceedings for Ruth Spiegelhalter ("Mrs. Spiegelhalter"). (**L.F. 7 - 10**). Given that Appellants have argued that Respondent Beverly Sue Ryan, P.A., Conservator for Ruth Spiegelhalter, filed her underlying lawsuit outside of the statute of limitations, Respondent believes that factual information contained in the conservatorship case bears directly on matters presented in Appellants' brief such that said information needs to be included herein.

As reflected on the Case History Sheet (**L.F. 7**), on July 15, 1997, Respondent Albert T. Spiegelhalter, Sr. filed an Application for Appointment of Guardian and Conservator for Mrs. Spiegelhalter along with a List of Prospective Witnesses. Appellants did not include this document as part of the Legal File. Respondent has included said document in the Supplemental Legal File. (**S.L.F. 2 - 5**).

As reflected on the Case History Sheet (**L.F. 7**), on August 1, 1997, the Probate Court entered an Order of Hearing and Appointment of Attorney, Notice to Alleged Incapacitated and Disabled Person.

As reflected on the Case History Sheet (**L.F. 7**), on December 30, 1997,

Respondent Albert T. Spiegelhalter, Sr. filed a Motion for Emergency Guardianship Hearing for Mrs. Spiegelhalter. (L.F. 7).

As reflected on the Case History Sheet (L.F. 8), on December 31, 1997, the Court held a hearing on Respondent Albert T. Spiegelhalter, Sr.'s Motion for Emergency Guardianship Hearing. Following hearing, Judge Harman entered an Order Appointing Respondent John A. Spiegelhalter, Guardian ad Litem for Mrs. Spiegelhalter. Appellants did not include this Order as part of the Legal File. Respondent has included said Order in the Supplemental Legal File. (S.L.F. 6 - 7). Judge Harman specifically found that **an emergency exists which presents a substantial risk that serious physical harm or irreparable damage will occur to Mrs. Spiegelhalter because of her inability to provide for her essential human needs; that she had suffered a stroke and was paralyzed on her right side; that she was not ambulatory; that she has memory lapses and does not take medication as prescribed; and that she requires 24 hour care. (emphasis added) (S.L.F. 6 - 7).**

As reflected on the Case History Sheet (L.F. 8), on December 31, 1997, Appellant Teresa M. Gable filed an Application for Appointment of Guardian and Conservator for Mrs. Spiegelhalter. Appellants did not include said Application as part of the Legal File. Respondent has included said document in the Supplemental Legal File. (S.L.F. 8 - 10). Appellant alleged that Mrs. Spiegelhalter is **physically and mentally unable to take care of herself; has memory loss; is unable to handle financial affairs; and suffers from several debilitating maladies. (emphasis added) (S.L.F. 8).**

Appellants filed a Motion to Dismiss on February 5, 1999. (**L.F. 77 - 79**). Appellants set forth three grounds for dismissal: the Court lacked subject matter jurisdiction; the Petition failed to state a cause of action; and the applicable statute of limitations expired.

On February 16, 1999, Respondent filed her Reply to Appellants Motion to Dismiss. (**L.F. 87 - 92**).

A hearing on the Motion to Dismiss was held on June 2, 1999. The only witness who testified at said hearing was Appellant Gary Gable. (**TR. 5 - 26**). Appellants offered into evidence two Real Estate Contracts and one Contract for Deed at the hearing on the Motion to Dismiss. (**TR. 8 - 9**). Appellant Gary Gable further testified that Mrs. Spiegelhalter paid \$235.00 per month on the outstanding note to the Appellants during the period of time from 1988 until John Spiegelhalter purchased the property. (**TR. 24**). The Court took the Motion under advisement while providing Appellants time to file suggestions with Respondents being given additional time to file responses to said Appellants' suggestions.

On June 16, 1999 Appellants filed Suggestions in Support of their Motion to Dismiss. (**L.F. 95 - 102**). Appellants' Suggestions addressed three issues: the jurisdiction of the probate court to hear tort claims; Respondent's claims being barred by the applicable statute of limitations; and the Court lacking authority to award punitive damages, conservator fees or attorney fees in a discovery of assets action. Only the first two of these issues are being asserted by Appellants on appeal.

On June 29, 1999, Respondent filed her Reply to Appellants Suggestions in Support of Motion to Dismiss. Even though Appellants have raised issues concerning their Motion to Dismiss, Appellants failed to include Respondent's Reply as part of the Legal File. Respondent has included said document in the Supplemental Legal File. **(S.L.F. 11 - 17).**

On September 14, 1999, the Court made a docket entry denying Appellants' Motion to Dismiss. **(L.F. 3).**

Trial in this cause began on October 15 and concluded on October 20, 1999. At trial, only one Real Estate Contract, the one dated December 3, 1998 with a selling price of \$60,000.00, was offered and admitted into evidence. **(TR. 217, L.F. 37, Trial Exhibit 6).** With regard to said real estate contract, Respondent Albert T. Spiegelhalter, Sr. testified that a family meeting took place in 1995 at which time Appellant Teresa Gabel told himself as well as Respondents John Spiegelhalter, Mary Ann Wilson, William Spiegelhalter, Jane Weimhold and Albert Michael Francis Spiegelhalter that the sale price of the condominium was \$60,000.00 with the Appellants carrying an \$11,000.00 note. **(TR. 120 - 121).** Respondent Mary Ann Wilson further testified that she had a conversation with Appellant Teresa Gable where said Appellant told her the purchase price was \$60,000.00. **(TR. 185 - 186).** Respondent John Spiegelhalter also testified as to the family meeting that took place in 1995 in which the purchase price of \$60,000.00 was discussed. **(TR. 197).** Respondent Albert T. Spiegelhalter, Sr. further testified that Mrs. Spiegelhalter made a \$49,000.00 downpayment on said purchase. **(TR. 124).** While

these family members testified as to the purchase price, the downpayment and the note being carried by Appellants, neither Gary Gabel nor Teresa Gabel appeared or testified at trial. In fact, no witnesses were called or evidence presented on behalf of Appellants.

On December 2, 1999, Appellants filed their Suggestions in Support of Motion to Dismiss at the Close of Plaintiff's Case.

On December 13, 1999, Respondent filed her Reply to Appellants Suggestions in Support of Motion to Dismiss at the Close of Plaintiff's Case. Appellants raised issues concerning said Motion to Dismiss in this appeal but failed to include Respondent's Reply in the Legal File. Respondent's Reply is contained in the Supplemental Legal File. **(S.L.F. 18 - 25)**

POINTS RELIED ON AND AUTHORITIES

- I. THE COURT DID NOT ERR WHEN IT ENTERED JUDGMENT IN FAVOR OF BEVERLY SUE RYAN, P.A. AND AGAINST APPELLANTS GARY AND TERESA GABEL UNDER COUNT 10 AS SUBSTANTIAL EVIDENCE WAS PRESENTED THAT APPELLANTS WERE ADVERSELY WITHHOLDING PROCEEDS FROM THE SALE OF REAL PROPERTY WHICH PROPERLY BELONGED TO RUTH SPIEGELHALTER.**

Barrett v. Flynn

Estate of Cantonia v. Sindel

Hammill v. Hammill

In re Estate of Foster

In re the Estate of Halverson

In re Estate of Miller

Osterberger v. Hites Const. Co.

Robertson v. Robertson

State ex rel. Knight v. Harman

Article V, V.A.M.S. Const. Amend. (1976)

Section 472.020 R.S.Mo. (1994)

Section 472.030 R.S.Mo. (1994)

Section 473.340 R.S.Mo. (1994)

Section 475.160 R.S.Mo. (1994)

Section 478.260 R.S.Mo. (1994)

II. THE COURT DID NOT ERR IN DENYING APPELLANTS' MOTION TO DISMISS WHICH WAS FILED PRIOR TO TRIAL AND AFTER THE EVIDENCE CONCLUDED AS THE PROBATE DIVISION OF THE CIRCUIT COURT DETERMINES ALL MATTERS PERTAINING TO PROBATE BUSINESS AND HAS GENERAL EQUITABLE JURISDICTION.

Chaney v. Cooper

In re Estate of Goldenberg

Matter of Estate of Woodrum

Art. V, Section 1, V.A.M.S. Const. Amend. 1976

Art. V, Section 27.2, V.A.M.S. Const. Amend. 1976

Art. V, Section 27.4a, V.A.M.S. Const. Amend. 1976

Section 472.020 R.S.Mo. (1994)

Section 478.260 R.S.Mo. (1994)

**III. THE COURT DID NOT ERR IN DENYING APPELLANTS'
MOTION TO DISMISS FILED PRIOR TO TRIAL AS ANY
APPLICABLE STATUTE OF LIMITATIONS WAS TOLLED
FOLLOWING THE COURT'S DETERMINATION THAT RUTH
SPIEGELHALTER WAS INCAPACITATED AND DISABLED.**

Alvarado v. H & R Block, Inc.

Joplin CMI, Inc. v. Spike's Tool and Die, Inc.

Modine Mfg. Co. v. Carlock

Schwartz v. Lawson

Missouri Rule of Court 41.01(b)

Missouri Rule of Court 55.08

Missouri Rule of Court 55.26

Clay County Local Rule 33.2.1

Section 516.110 R.S.Mo. (1994)

Section 516.120 R.S.Mo. (1994)

Section 516.170 R.S.Mo. (1994)

ARGUMENT

I. THE COURT DID NOT ERR WHEN IT ENTERED JUDGMENT IN FAVOR OF BEVERLY SUE RYAN, P.A. AND AGAINST APPELLANTS GARY AND TERESA GABEL UNDER COUNT 10 AS SUBSTANTIAL EVIDENCE WAS PRESENTED THAT APPELLANTS WERE ADVERSELY WITHHOLDING PROCEEDS FROM THE SALE OF REAL PROPERTY WHICH PROPERLY BELONGED TO RUTH SPIEGELHALTER.

Respondent would agree with Appellants' statement as to the standard of review in a Court tried case. Respondent obviously disputes however, Appellants' contention that Respondent failed to prove her case by substantial evidence.

Before examining the specific evidence presented at trial, an examination of the pleadings filed by the parties is appropriate. It should be noted, however, that strict rules of pleading applied in other cases do not apply in probate proceedings. In re Estate of Miller, 9 S.W.3d 760 (Mo. App. S.D. 2000); In re Estate of Foster, 878 S.W.2d 896 (Mo. App. E.D. 1994). A petition filed in the probate division is sufficient if it gives reasonable notice of the nature and extent of the claim. Id. at 897; Barrett v. Flynn, 728 S.W.2d 288, 291 (Mo. App. W.D. 1987).

Respondent filed a discovery of assets action in multiple counts. (L.F. 13 - 22). A discovery of assets action is, as the name implies, a search for assets. State ex rel. Knight v. Harman, 961 S.W.2d 951 (Mo. App. W.D. 1998). The purpose of the action is to determine whether an asset belongs to an estate. Robertson v. Robertson, 15 S.W.3d 407 (Mo. App. S.D. 2000); In re the Estate of Halverson, 840 S.W.2d 280, 284 (Mo. App. W.D. 1992). In addition, the discovery of asset statutes, Sections 473.340 R.S.Mo. and 475.160 R.S.Mo. provide a procedural vehicle by which a party, who claims the property which should be an asset of an estate but which has been disposed of, may seek a money judgment for the value of the property so disposed of, including interest and all other losses except attorney fees.

While Section 475.160 R.S.Mo. sets forth the statutory cause of action for discovery of assets in a conservatorship case, the proceedings governing such an action are set forth in Section 473.340 R.S.Mo.. This Section, which governs an action involving decedent's estates, provides in relevant part:

3. Upon a trial of the issues, the court shall determine the persons who have an interest in said property together with the nature and extent of any such interest. The court shall direct the delivery or transfer of the title or possession, or both, of said property to the person or persons entitled thereto and may attach the person of any party refusing to make delivery as directed. **If the party found to have adversely withheld the title,**

possession, or both, of said property has transferred or otherwise disposed of the same, the court shall render a money judgment for the value thereof with interest thereon from the date the property, or any interest, therein, was adversely withheld. (emphasis added)

As to Count X of Respondent's Petition, Respondent alleged that Mrs. Spiegelhalter purchased a condominium at 7140 N. Kingston Court, Gladstone, Missouri from Appellants for \$60,000.00 in 1988. A copy of the real estate contract regarding said sale dated December 3, 1988 was attached to said Petition and admitted into evidence at trial. **(L.F. 37)**. Respondent alleged that Mrs. Spiegelhalter made a \$49,000.00 downpayment on said residence and that Appellants agreed to carry a note for \$11,000.00 for the balance of the purchase price. **(L.F. 27)**. Respondent alleged at the time of the purported sale to Mrs. Spiegelhalter, Appellants did not have title to said residence. **(L.F. 27)**. Further, Respondent alleged that Appellants did not obtain title to said residence until April 1996. **(L.F. 28)**. Finally, Respondent alleged that said property was sold in 1998 for \$101,000.00. **(L.F. 28)**. Respondent sought relief in the form of a money judgment for the difference in the amount paid to Mrs. Spiegelhalter following the sale of the property in 1998 and what she should have received had the property been transferred to her pursuant to the contract of December 3, 1988.

In their Answer to Count X, Appellants generally denied the allegations contained in said Count and then set forth several affirmative defenses. **(L.F. 68 - 69)**. No

allegation was made in Appellants' Answer or in evidence presented at trial as to Appellants' lack of ownership of the condominium at the time the contract was entered into. In addition, Appellants, now for the first time on appeal, argue that they had no interest in the property located at 7140 N. Kingston Court at the time Mrs. Spiegelhalter was declared to be incapacitated and disabled.

Respondent Albert T. Spiegelhalter, Sr. testified he had a discussion with Appellant Teresa Gabel prior to December 3, 1988 whereby Appellant informed Mr. Spiegelhalter that Appellants were building a condominium that they wanted Mrs. Spiegelhalter to move into for convenience as she was getting up in age. **(TR. 118)**.

Evidence presented at trial established that Mrs. Spiegelhalter entered into the contract dated December 3, 1988 whereby Appellants purported to sell the condominium to her for the sum of \$60,000.00. **(TR. 217)**. Substantial evidence was presented to the trial court that Mrs. Spiegelhalter had purchased said condominium from Appellants for the sum of \$60,000.00. Respondent Albert T. Spiegelhalter, Sr. testified that a family meeting took place in 1995 at which time Appellant Teresa Gabel told himself as well as numerous other family members that the sale price of the condominium was \$60,000.00. **(TR. 120 - 121)**. Respondent Mary Ann Wilson testified she had a conversation with Appellant Teresa Gable wherein Appellant told her the purchase price was \$60,000.00. **(TR. 186)**. Respondent John Spiegelhalter also testified as to the family meeting that took place in 1995 and that the purchase price of \$60,000.00 was discussed. **(TR. 197)**.

Not only was this substantial evidence in support of the sale, but it was the only evidence presented. While these family members testified as to the purchase price of the condominium, Appellants neither appeared nor testified at trial. In fact, no witnesses were called or evidence presented on behalf of Appellants.

Not only was substantial evidence presented as to the purchase price, but substantial evidence was presented that Mrs. Spiegelhalter made a \$49,000.00 downpayment. The contract itself reflects the amount of the downpayment. **(L.F. 37)**. Respondent Albert T. Spiegelhalter Sr. testified that at the family meeting that took place in 1995, Appellant Teresa Gabel informed himself and the other family members that the amount of the downpayment was \$49,000.00. **(L.F. 124)**. Respondent Mary Ann Wilson testified that Mrs. Spiegelhalter had a check for \$49,000.00 transferred to an account with Appellant Teresa Gabel as a downpayment on the condominium. **(TR. 186)**. No evidence or testimony was presented on behalf of Appellants denying the amount of the downpayment.

Respondent Albert T. Spiegelhalter Sr. testified that at the family meeting that took place in 1995, Appellant Teresa Gabel informed himself and the other family members that Appellants were carrying a note in the amount of \$11,000.00. **(T.R. 121)**. Respondent Mary Ann Wilson testified that after the \$49,000.00 downpayment by Mrs. Spiegelhalter there was an \$11,000.00 balance. **(TR. 186)**. No evidence or testimony was presented on behalf of Appellants denying the amount of the promissory note.

Mrs. Spiegelhalter resided in the condominium from December 1988 (**L.F. 114**) until May 1997, when she was moved to a nursing home. (**L.F. 188, 198**). During the period of her residency, Appellant Gary Gabel testified that she paid the sum of \$235.00 per month. (**T.R. 24**).

Respondent John Spiegelhalter testified that at the family meeting in 1995, Appellant Teresa Gabel informed her brothers and sisters that the condominium was not in Mrs. Spiegelhalter's name. (**TR. 198**). A request was made that one of Mrs. Spiegelhalter's children buy the condominium as the same was in the name of Kingston Court Development and not in their mother's. (**TR. 198**). John Spiegelhalter testified that he purchased the property in 1996 for the sum of \$85,000.00 (**TR. 205**). Mr. Spiegelhalter further testified that he obtained a second mortgage on his personal residence for \$35,000.00 which he then paid to Appellants so that the property would be free and clear. (**TR. 206, 210**). Mr. Spiegelhalter testified that following his acquisition of the condominium, Mrs. Spiegelhalter paid him the sum of \$350.00 per month which was used to offset the second mortgage that he had taken out on his personal residence. (**TR. 207**). Again, Appellants presented no evidence or testimony disputing that they received \$35,000.00 from Mr. Spiegelhalter.

John Spiegelhalter testified that in late 1997 he entered into a listing agreement with Appellant Teresa Gabel whereby Appellant listed the 7140 N. Kingston Court property for sale. (**TR. 211**). Mr. Spiegelhalter additionally testified that he sold the

residence in January 1998 to Nancy Pummel for the sum of \$101,000.00. **(TR. 212)**. After paying closing costs, repairs, balance of the loan, and withholding sufficient funds to pay capital gains taxes, Mr. Spiegelhalter paid to Respondent as Conservator for Mrs. Spiegelhalter the sum of \$53,420.00. **(TR. 215)**. In addition, Mr. Spiegelhalter paid an additional \$1,900.00 to Respondent (at trial) as partial reimbursement of funds withheld for capital gains tax.

Appellants' argument is not only confusing, but misses the point of Count X. Respondent alleged and proved at trial that Appellants, while purporting to sell the condominium to Mrs. Spiegelhalter never transferred legal title to her. Respondent has alleged and proven that Mrs. Spiegelhalter lost money in the transaction by not having title transferred to her in connection with the December 3rd contract. Had title been transferred at the time Mrs. Spiegelhalter purchased the property she would have been able to sell the property and receive the benefits of the sale. However, in this case, the only people who made money on this transaction while defrauding Mrs. Spiegelhalter were Appellants. If Appellants did not have an ownership interest in said residence at the time the contract was entered into on December 3, 1988, then Appellants committed fraud by entering into a contract purporting to sell said residence to Mrs. Spiegelhalter. If, on the other hand, Appellants were owners of the property on December 3, 1988, Appellants committed fraud by not transferring legal title to said property to Mrs. Spiegelhalter.

The Court found that Mrs. Spiegelhalter purchased the property at 7140 Kingston Court for \$60,000.00. **(L.F. 109)**. The Court further found that Mrs. Spiegelhalter paid a lump sum of \$49,000.00 down payment with Appellants agreeing to carry a note for \$11,000.00 at 10 per cent per annum. **(L.F. 109)**. The Court further found that the Appellants were paid \$35,000.00 by John Spiegelhalter from a second mortgage he took out on his personal residence. **(L.F. 110)**. Respondent in Count X had sought the difference between the amount she received and the sales price for said residence. Judge Harman after taking into consideration the closing costs on the sale by Mr. Spiegelhalter entered Judgment in favor of Respondent in the sum of \$36,502.54. **(L.F. 112)**.

Section 472.020 R.S.Mo. provides that the probate division of the circuit court may hear and determine all matters pertaining to probate business. Section 472.030 provides that the probate division has the same legal and equitable powers to effectuate and enforce its orders, judgments and decrees in probate matters as circuit judges have in other matters.

The jurisdiction of the probate court and the discovery of asset statutes have undergone significant expansion over the years. With the Amendment of Article V of the Missouri Constitution in 1976, the jurisdiction of the probate court was significantly expanded. The Court Reform and Revision Act of 1978 implemented the Amendment and enacted Section 478.260 R.S.Mo. which provides that the "judge serving in the probate division shall have general equitable jurisdiction".

Prior to the Court Reform and Revision Act of 1978, the discovery of asset statutes only applied to personal property. With the enactment of said Act, the statutes were expanded to encompass both real and personal property.

Courts of equity may shape the remedy to meet the demands of justice without rigid adherence to any determined form. Hammill v. Hammill, 972 S.W.2d 632 (Mo. App. E.D. 1998); Osterberger v. Hites Const. Co., 599 S.W. 221 (Mo. App. E.D. 1980). In Estate of Cantonia v. Sindel, 684 S.W.2d 592, 595 (Mo. App. E.D. 1985) the Court noted the legal and equitable powers of the probate division and the authority to adjust equities between the parties without strict adherence to any determined form and shape the remedy to meet the demands of justice. While Appellants allege that Respondent did not prove by substantial evidence that Appellants owned the property at the time Mrs. Spiegelhalter was declared to be incapacitated and disabled, such an allegation does not defeat Respondent's claim. As the Court in Cantonia noted, the plaintiff does not have to label the cause as one in equity when the relief and principles are clearly equitable. Id.

In the case at bar, the only evidence presented was that Mrs. Spiegelhalter purchased the condominium from Appellants for \$60,000.00. The evidence was clear that Mrs. Spiegelhalter made a \$49,000.00 downpayment and Appellants agreed to carry an \$11,000.00 note. Further evidence established that Appellants were paid the sum of \$235.00 per month during the time that Mrs. Spiegelhalter resided in said residence. **(TR. 24)**. The evidence further established that Appellants were paid an additional

\$35,000.00 at the time that John Spiegelhalter acquired the property.

Appellants received payment from Mrs. Spiegelhalter (not including the commission paid to Appellant Teresa Gable at the time she sold the property on behalf of John Spiegelhalter) either directly or indirectly in the sum of \$107,500.00. Initially, Appellants received the \$49,000.00 downpayment. Next, Appellants received monthly payments of \$235.00 per month between January 1989 and May 1997. The total of these payment being \$20,680.00. Finally, Appellants received the sum of \$35,000.00 at the time that John Spiegelhalter purchased the residence in 1996.

II. THE COURT DID NOT ERR IN DENYING APPELLANTS' MOTION TO DISMISS WHICH WAS FILED PRIOR TO TRIAL AND AFTER THE EVIDENCE CONCLUDED AS THE PROBATE DIVISION OF THE CIRCUIT COURT DETERMINES ALL MATTERS PERTAINING TO PROBATE BUSINESS AND HAS GENERAL EQUITABLE JURISDICTION.

Appellants argue that the Court erred in denying their Motion to Dismiss as the Court lacked subject matter jurisdiction as the probate court is a court of limited jurisdiction and it could not hear and determine common law tort claims and breach of contract claims.

Appellants, on page 27 of their brief, make the bold assertion that a probate court is a court of limited jurisdiction. Appellants then cite Section 472.020 R.S.Mo. for the proposition that the probate court can only hear matters pertaining to probate business. Appellants then assert, without authority, that the probate court cannot hear general tort claims.

Appellants' reference to the "probate court" is a misnomer. With the adoption of the Amendment to Article V of the Missouri Constitution in 1976, probate courts were

abolished. Art. V, Section 27.2, V.A.M.S. Const. Amend. 1976. A three tier court system was established consisting of the Supreme Court, a court of appeals consisting of districts, and circuit courts. Art. V, Section 1, V.A.M.S. Const. Amend. 1976. In addition, probate judges became circuit judges and were vested with the same powers and jurisdiction as judges of the circuit court to hear and determine any case within the jurisdiction of the circuit court. Art. V, Section 27.4a, V.A.M.S. Const. Amend. 1976.

Section 472.020 R.S.Mo. provides that the probate division of the circuit court may hear and determine all matters pertaining to probate business. The Amendment of Article V of the Missouri Constitution in 1976, significantly expanded the jurisdiction of the probate court. The Court Reform and Revision Act of 1978 implemented the Amendment and enacted Section 478.260 R.S.Mo. which provides that the "judge serving in the probate division shall have general equitable jurisdiction".

A discovery of assets proceeding is a special statutory proceeding over which the probate division has original and exclusive jurisdiction. Estate of Williams v. Williams, 12 S.W.3d 302, 305 (Mo. banc 2000); Chaney v. Cooper, 954 S.W. 2d 510 (Mo. App. W.D. 1997). With jurisdictional impediments removed by court reform, the jurisdiction of the probate division as it pertains to discovery of asset actions has been significantly expanded.

Appellants reliance on In re Estate of Goldenberg, 601 S.W.2d 637 (Mo. App. E.D. 1980) and Matter of Estate of Woodrum, 859 S.W.2d 259 (Mo. App. W.D. 1993) is

misplaced. Goldenberg is clearly distinguishable from the case at bar. **First**, Goldenberg, is a pre-reform case. **Second**, since it was decided pre-reform, the discovery of assets statute involved limited the parties who could initiate such an action, limited the type of property allegedly withheld, and further limited the proceeding to an effort to bring a claimed asset into the estate. **Third**, the Court noted that the statute under which the Appellant was proceeding dealt with the "determination of title to, and/or right of possession of, personal property claimed to be an asset of the estate". Id. at 639. The Court then noted that the statute "is not intended as a device to test general fiduciary conduct, improper administration of the estate, or general disputes between the heirs". Id. The Court did find that allegations that the decedent had four certificates of deposit at the time of his death which were not inventoried did state a cause of action for discovery of assets. Id. at 639. In the case at bar, Respondent alleged and proved that an asset which should have been a part of the estate had been sold and that Appellants had received the benefit of the sale. As such, pursuant to the statutes governing discovery of assets, Respondent is entitled to a judgment for the value of the lost property.

Matter of Estate of Woodrum is also distinguishable. In Woodrum the trial court dismissed a petition for discovery of assets against a former conservator and his surety. The Southern District reversed the trial court's ruling dismissing the petition for discovery of assets as to the conservator because the Southern District found that the allegations contained in the petition stated a cause of action against the conservator. Id.

at 261. The Southern District, however, affirmed as to the holding against the surety. Id. at 262. Appellants concentrate only on the second part of the trial court's ruling which dismissed the action to recover on the surety bond covering the conservator. Unlike the case at bar, no allegation was made in Woodrum that the surety had possession or title to assets, or had disposed of assets which were owned by the estate.

In the case at bar, Respondent alleged that Appellants, while entering into a contract with Mrs. Spiegelhalter for the sale of the condominium, failed to transfer legal title to her. The clear evidence is that Mrs. Spiegelhalter made a \$49,000.00 downpayment and made monthly payments of \$235.00 per month on the \$11,000.00 note held by Appellants during the time she resided in said residence. In addition, the evidence was clear that Appellants received the sum of \$35,000.00 at the time the residence was sold in 1998.

Courts of equity are not burdened by strict adherence to a form remedy under the circumstances of a given case. Rather, a court has the authority to fashion a remedy which meets the needs of justice. Judge Harman entered an appropriate judgment by finding that Appellants had received proceeds of the sale of the condominium which rightfully belonged to Mrs. Spiegelhalter had legal title been transferred to her at the time the contract was signed on December 3, 1988.

III. THE COURT DID NOT ERR IN DENYING APPELLANTS' MOTION TO DISMISS FILED PRIOR TO TRIAL AS ANY APPLICABLE STATUTE OF LIMITATIONS WAS STAYED FOLLOWING THE COURT'S DETERMINATION THAT RUTH SPIEGELHALTER WAS INCAPACITATED AND DISABLED.

Respondent would submit that this Court not consider Appellants argument as to the statute of limitations defense as Appellants abandoned the argument by not replying in their Reply Brief filed with Western District. Appellants' original brief submitted three arguments. The third argument submitted was based upon the statute of limitations. **(Appellants brief pg. 30 - 35)**. On December 21, 1999, Respondent filed her brief and addressed the statute of limitations issue on pages 21 through 26. **(Respondent's brief pg. 21 - 26)**. Respondent's brief submitted that any statute of limitations applicable was tolled no later than February 6, 1998 the date upon which Mrs. Spiegelhalter was declared to be incapacitated and disabled. **(Respondent's brief pg. 24 - 25)**. Following the filing of Respondent's brief, Appellants filed a Reply Brief on or about January 19, 2001. While Appellants argued points one and two of their original brief, Appellant failed to addresses issues raised in Respondent's brief as to the statute of limitations. By

failing to address this issue in Appellant's Reply Brief, Respondent has abandoned said point. Not only did Appellants fail to address the statute of limitations in their Reply Brief, but Appellants made no mention as to the statute of limitations at oral argument.

Respondent submits Appellants have misconstrued the decision of the Western District. Moreover, Respondent submits that decision of the Western District was the correct result. Assuming that this Court intends to consider the issue, Respondent would submit that some background surrounding the argument is required.

Appellants first raised an issue as to the statute of limitations in their Answer to Respondent's Petition. Appellants alleged that "the applicable statute of limitations bars Plaintiff from making any claim as alleged in Count X". (**L.F. 68**). Appellants, however, did not allege in their Answer what statute of limitations they contend applied. As a general rule, a party desiring to assert a statute of limitations defense must plead the specific statute upon which he relies. Alvarado v. H & R Block, Inc., 24 S.W.3d 236, 241 (Mo. App. 2000). In addition, "one seeking to take advantage of the statute of limitations 'must plead the very provision on which he depends.'" Modine Mfg. Co. v. Carlock, 510 S.W.2d 462, 467 (Mo. 1974). (citations omitted).

Respondent filed her Reply to Affirmative Defenses which contained a general denial. (**L.F. 80**). Without knowing what statute of limitations Appellants contended applied, Respondent could not file a more specific reply.

Appellants filed their Motion to Dismiss on February 5, 1999. (**L.F. 77 - 79**).

Appellants alleged in part that "the applicable statute of limitations has expired and the Plaintiff is guilty of laches". (**L.F. 77**). Appellants' Motion failed to set forth any reference to a specific statute of limitation or provision that applied.

Respondent filed her Reply to said Motion to Dismiss on February 16, 1999. (**L.F. 87 - 92**). In specific reference to the statute of limitations, Respondent again responded that Appellants had yet to set forth what statute of limitations they contended applied. (**L.F. 90**).

On June 2, 1999, a hearing was held on Appellants' Motion to Dismiss. (**L.F. 1 - 32**). Prior to hearing any testimony, Respondent's counsel requested that the Motion be dismissed as the same did not comply with Missouri Rule of Court 55.26 and Clay County Local Rule 33.2.1 as set forth in Respondent's Reply to Appellants' Motion to Dismiss. (**L.F. 3 -5**). Respondent's counsel further argued that there was no mention as to specifics of the statute of limitations argument. (**L.F. 4**). At the conclusion of said hearing Appellant was provided 14 days in which to file any Suggestions in Support of the Motion to Dismiss and Respondent was provided an additional 14 days to respond. (**TR. 31**).

On June 16, 1999, Appellants filed Suggestions in Support of their Motion to Dismiss. (**L.F. 95 - 102**). Even though an Answer and Motion to Dismiss had previously been filed by Appellants, these Suggestions represent the **first time** that Appellants identified a specific statute of limitations which Appellants claimed barred Respondent's

Petition. Appellants alleged that Respondent's action was barred by the 10 year statute of limitations set forth in Section 516.110 R.S.Mo. or the 5 year statute of limitations contained in Section 516.120 R.S.Mo.. **(L.F. 97 - 99).**

Respondent filed her Reply to Appellants Suggestions in Support of Motion to Dismiss on June 29, 1999. Appellants failed to include Respondent's Reply as part of the Legal File and as such, Respondent was required to file said document as part of the Supplemental Legal File. **(S.L.F. 11 - 17).** As to the statute of limitations, Respondent argued that due to the incapacity and disability of Mrs. Spiegelhalter, Missouri law provided a tolling on any statute of limitations when a person is incapacitated. **(S.L.F. 14).** Additionally, Respondent argued that Appellant Teresa Gabel believed that Mrs. Spiegelhalter was incapacitated and disabled at the time she filed her Application for Appointment of Guardian and Conservator on December 31, 1997 and as such the tolling provision went into effect on that date. **(S.L.F. 14).** The Court entered a formal order declaring Mrs. Spiegelhalter incapacitated and disabled on February 6, 1998. **(S.L.F. 14, L.F. 11 - 12).**

On September 14, 1999, the Court entered a docket entry denying Appellants' Motion to Dismiss. **(L.F. 3).**

Appellants now argue that the Court erred in denying Appellant's Motion to Dismiss as they were not required to plead a specific statute of limitations as the Court, pursuant to Rule 41.01(b), had not ordered that Rules 41 through 101 be applicable to the

case at bar. Appellants further argue that Respondent's Petition was barred by the applicable statute of limitations which Appellants contend is either Section 516.110 or 516.120.

Appellants recitation of Rule 41.01(b) is accurate. However, Appellants' analysis of Rule 55.08 and decision of the Western District is flawed. Appellants agree that the general rule is that a party asserting an affirmative defense of the statute of limitations must plead the same. (**Appellants Substitute Brief pg. 40**). Appellants then argue that because the Trial Judge failed to enter an order pursuant to Rule 41.01(b) they are relieved from the "specificity of pleading requirement". Appellants however, cite no authority for such an assertion. Respondent would submit that it appears that what Appellants are arguing is that they can argue the statute of limitations **without ever** specifically identifying the statute upon which they are relying. Such a position is illogical and makes it impossible for Respondent to address the issue.

Appellants additionally argue that requiring them to plead a statute of limitations defense pursuant to Rule 55.08 is contrary to the Southern District holding in Duncan v. Estate of Booker, 816 S.W.2d 705 (Mo. App. S.D. 1991). As can be gleaned from a review of the facts, Booker is clearly distinguishable. In Booker a claim was filed against a decedent's estate. The original claim was filed on July 18, 1989 based upon an unpaid promissory note which was attached to the claim. An amended claim was filed on April 2, 1990 "on account of a debt due for non-payment of a loan". The amended claim did

not have any written instrument attached to it. A Motion to Strike or Dismiss the Amended Claim was filed by the estate asserting that the same was barred by the 5 year statute of limitations contained in Section 516.120 R.S.Mo.. Id. at 708. The Southern District sustained the Motion to Dismiss on the basis that the Amended Claim was filed more than 5 years following the last payment on a promissory note and was filed outside the statute of limitations. Id. The claimants in Booker did not present any evidence to counter the statute of limitations nor did they object to the filing of the Motion. Id. at 710, 711. The issue in Booker was actually over whether the estate by failing to make objections to the amended claim within 20 days after service could argue the statute of limitations. Id. at 710. In the case at bar not only did Respondent take exception to the Motion to Dismiss but Respondent filed specific suggestions setting forth evidence which countered the statute of limitations defense.

The actual issue in the case at bar is not whether Appellants properly asserted a statute of limitations but rather, whether Respondent's Petition was filed within the applicable statute of limitations. Based upon the evidence presented there can be no doubt but that Respondent's Petition was timely filed.

On December 3, 1988, Mrs. Spiegelhalter entered into a contract for the purchase of the property located at 7140 N. Kingston Court. **(TR. 217, L.F. 37, Trial Exhibit 6)** Given that the statute of limitations for an action based upon the sale of real property is 10 years, Mrs. Spiegelhalter, individually, had until December 3, 1998 in which to file an

action concerning that contract. However, even that date can be extended if 1) Mrs. Spiegelhalter is incapacitated or disabled; or 2) the transaction involved fraud.

On July 15, 1997, Respondent Albert T. Spiegelhalter, Sr. filed an Application for Appointment of Guardian and Conservator for Mrs. Spiegelhalter. (S.L.F. 2 - 5).

On December 30, 1997, Respondent Albert T. Spiegelhalter, Sr. filed a Motion for Emergency Guardianship Hearing for Mrs. Spiegelhalter.

On December 31, 1997, the Court held a hearing on Respondent Albert T. Spiegelhalter, Sr.'s Motion for Emergency Guardianship. Following hearing, Judge Harman entered an Order Appointing Respondent John A. Spiegelhalter, Guardian ad Litem for Mrs. Spiegelhalter. (S.L.F. 6 - 7). Judge Harman specifically found that **an emergency exists which presents a substantial risk that serious physical harm or irreparable damage will occur to Mrs. Spiegelhalter because of her inability to provide for her essential human needs; that she had suffered a stroke and was paralyzed on her right side; that she was not ambulatory; that she has memory lapses and does not take medication as prescribed; and that she requires 24 hour care. (emphasis added) (S.L.F. 6 - 7).**

On December 31, 1997, Appellant Teresa M. Gable filed an Application for Appointment of Guardian and Conservator for Mrs. Spiegelhalter. (S.L.F. 8 - 10). Appellant alleged that Mrs. Spiegelhalter is **physically and mentally unable to take care of herself; has memory loss; is unable to handle financial affairs; and suffers**

from several debilitating maladies. (emphasis added) (S.L.F. 8).

Following a hearing, Respondent Ryan was appointed conservator and Respondent John Spiegelhalter was appointed guardian for Mrs. Spiegelhalter on February 6, 1998. **(L.F. 11 - 12).**

Respondent, following meetings with family members and after having reviewed certain documentation that family members produced, filed the underlying lawsuit against Appellants on December 11, 1998. **(L.F. 13 - 34).** Said action was filed approximately 10 months following Respondent's appointment.

In their Suggestions in Support of their Motion to Dismiss, Appellants argued that an action on the December 3, 1988 contract had to be filed within 10 years of that date. **(L.F. 98).** Respondent's Petition was filed on December 11, 1998. Appellants allege that said action was filed more than 10 years after the contract between Appellants and Mrs. Spiegelhalter was entered into and therefore was barred by the ten year statute of limitations set forth in Section 516.110 R.S.Mo.. **(L.F. 97 - 99).** While Respondent would agree that her action was filed more than 10 years following the execution of the contract on December 3, 1988, Respondent would submit that due to the tolling provision of Section 516.170 R.S.Mo., Respondent's Petition was timely filed.

An action upon any writing, in this case the December 3, 1988 contract to purchase real estate, for the payment of money or property is governed by the ten year statute of limitations contained in Section 516.110 R.S.Mo.. See also, Joplin CMI, Inc.

v. Spike's Tool and Die, Inc., 719 S.W.2d 930 (Mo. App. S.D. 1986). However, if a transaction involves fraud, the limitation period changes. An action for relief on the ground of fraud does not accrue until the facts constituting the fraud are discovered. Schwartz v. Lawson, 797 S.W.2d 828 (Mo. App. W.D. 1990). The Court in Schwartz noted that the special statute of limitations, Section 516.120(5) R.S.Mo., grants 10 years for the discovery of the fraud and requires that an action be commenced within 5 years of discovery. Id. at 832. In the case at bar, until the family meeting in 1995, everyone assumed that a deed had been transferred following the execution of the contract in December 1988. Arguably then, Mrs. Spiegelhalter had, at a minimum, until 2010 to bring an action.

In the case at bar, Mrs. Spiegelhalter's incapacity tolled the running of the statute of limitations. Under Missouri law, a statute of limitations is tolled when a person is mentally incapacitated. Section 516.170 R.S.Mo. provides in relevant part:

...if any person entitled to bring an action at the time the cause of action accrued be either within the age of twenty-one years or mentally incapacitated, such person shall be at liberty to bring such action with the respective statute of limitations after such disability is removed.

The Application for Appointment of Guardian and Conservator filed by Respondent Albert T. Spiegelhalter, Sr. on July 15, 1997 (**S.L.F. 2 - 5**), certainly indicated a belief by him that Mrs. Spiegelhalter was incapacitated and disabled as of that

date. Appellant Teresa Gable filed her Application for Appointment of Guardian and Conservator on December 31, 1997 (**S.L.F. 8 - 10**) and indicated her belief that Mrs. Spiegelhalter was incapacitated and disabled as of that date.

Based upon the evidence presented at trial on the guardianship applications on February 6, 1998, the Court determined Mrs. Spiegelhalter to be totally incapacitated and disabled. (**L.F. 11 -12**). With this determination it is clear that any statute of limitations was tolled no later than February 6, 1998. At the time the Court entered its order declaring Mrs. Spiegelhalter incapacitated and disabled, Mrs. Spiegelhalter still had almost 10 months in which to bring an action on the contract entered into on December 3, 1988. Since Mrs. Spiegelhalter had time remaining to bring such an action and since her disability has not yet been removed, the tolling provision of Section 516.170 remains in effect today, Respondent's Petition was timely filed.

In addition to the tolling provisions, due to the nature of the December 3rd transaction an argument exists that the failure to transfer title to Mrs. Spiegelhalter constituted fraud. Until a family meeting in 1995, everyone with the exception of Appellants believed that legal title had been transferred following execution of the contract on December 3, 1988. It was at this family meeting that family members first learned that title had not been passed. As such, an argument can certainly be made that if the fraud was discovered in 1995, under the provisions of Section 516.120(5) the applicable statute of limitations would not run until 2010. Schwartz at 832. Under those

circumstances there can be no question that Respondent's Petition was timely filed.

CONCLUSION

The Trial Court had substantial evidence presented to it to support the judgment entered against Appellants.

The uncontradicted evidence in this case was that Mrs. Spiegelhalter purchased a condominium from Appellants in December 1988 for the sum of \$60,000.00; that she made a \$49,000.00 downpayment; that Appellants agreed to carry a note for \$11,000.00 amortized over 15 years; and that Appellants never transferred legal title to Mrs. Spiegelhalter.

Mrs. Spiegelhalter resided in the condominium for a period of nine years. During this period of time she paid Appellants \$235.00 per month.

Appellants informed other family members in 1995 that someone should purchase the condominium as Kingston Court Development still held legal title as the same had not been transferred to Mrs. Spiegelhalter. Respondent John Spiegelhalter agreed to purchase the condominium for \$85,000.00 in 1996. Mr. Spiegelhalter took out a second mortgage on his personal residence in the amount of \$35,000.00. The proceeds of said loan were paid to Appellants to clear their debt on the residence. In 1998, Mr. Spiegelhalter sold the condominium for \$101,000.00. Respondent Ryan received approximately \$55,000.00 as compensation for Mrs. Spiegelhalter's interest in said

condominium.

The evidence was clear that Appellants failed to transfer legal title to Mrs. Spiegelhalter. However, Appellants did not testify nor did they offer any evidence to dispute the facts that they received the \$49,000.00 downpayment, payments of \$235.00 per month for nine years or the \$35,000.00 payment from John Spiegelhalter. The Trial Court had substantial evidence to support its judgment.

Appellants argument that the probate division lacked jurisdiction in this case is without legal support. The probate division can hear all matters which can be presented to the circuit court and has both legal and equitable powers. Judge Harman used those equitable powers to fashion a remedy which insured that Mrs. Spiegelhalter received the benefit of the purchase and subsequent sale of the condominium.

Appellants argument that Respondent's Petition was barred by the statute of limitations is also without merit. An action on a contract involving real estate is ten years. That statute can be extended when a person is incapacitated or there are allegations of fraud which are undiscovered. When a person entitled to bring an action is determined to be incapacitated or disabled, the statute of limitations governing such action is stayed until the disability is removed. The contract entered into evidence was dated December 3, 1988. Mrs. Spiegelhalter's children believed her to be incapacitated and disabled as early as July 1997. Judge Harman appointed a guardian ad litem in December 1997. Appellant Teresa Gabel believed her mother to be incapacitated in

December 1997 when she filed her Application for Appointment of Guardian and Conservator. The Court appointed Respondent conservator on February 6, 1998. On that date any statute of limitations for this cause of action was stayed.

In this case, no one knew that legal title had not been transferred to Mrs. Spiegelhalter until a family meeting in 1995. As such, the fraud was not discovered until that date and Respondent's filing in December 1998 was timely.

Given that Mrs. Spiegelhalter's disability remains to this day, there can be no question that Respondent's Petition was timely filed. As such, the decision of the Western District should be affirmed.

Respectfully submitted,

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IN THE MISSOURI SUPREME COURT

BEVERLY SUE RYAN, P.A.,)	
CONSERVATOR FOR THE ESTATE OF)	
RUTH SPIEGELHALTER,)	
)	
Respondent,)	
v.)	SC 83805
)	
WILLIAM SPIEGELHALTER, et al.,)	
)	
Respondents,)	
)	
GARY AND TERESA GABEL,)	
)	
Appellants.)	

RESPONDENT'S CERTIFICATE

I hereby certify that pursuant to Missouri Rule of Court 84.06(c) that Respondent Beverly Sue Ryan's Substitute Brief, and all copies were filed and served in accordance with Missouri Rule of Court 84.06 (g):

1. Comply with Rule 55.03;
2. Comply with the limitations set forth in Rule 84.06(b);
3. Contains 8,560 words according to Microsoft Word for Windows software.

Respondent also certifies that a copy of the foregoing brief was stored on an IBM-PC compatible 1.44 MB, 3 1/2 inch floppy disk which was scanned for viruses with Innoculate IT Virus software and that according to said software, the floppy disk and all copies of the same were virus free.

4. I certify further certify that on this ____ day of September, 2001, a copy of the foregoing Respondent's Brief, in both the format required pursuant to Rule 84.06(b) and 84.06(g) were served on all counsel and parties by placing a copy in the U.S. Mail postage prepaid to:

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